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September 16, 2003

VIA FACSIMILE AND U.S. MAIL

Ms. Cynthia Tompkins / Ms. Mary Taksar / Mr. Mark Allen
General Counsel's Office
Central Enforcement Docket
Federal Election Commission
999 E Street N.W.
Washington, DC 20463

Re: MUR 5181
Spirit of America PAC and Garrett M. Lott, as Treasurer
Ashcroft 2000 and Garrett M. Lott as Treasurer

Dear Ms. Tompkins:

Enclosed please find the joint Supplemental Reply Brief originally on behalf of Spirit of America PAC and Garrett M. Lott, as Treasurer and Ashcroft 2000 and Garrett M. Lott as Treasurer. Please contact either of the undersigned with any further questions or comments. Thank you.

Very truly yours,

Tony P. Trimble
Matthew W. Haapoja
\mh

enc.

cc: Ben Ginsberg (w/encl.)
Garrett M. Lott (w/encl.)

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of Spirit of America PAC and Garrett Lott, as Treasurer; Ashcroft 2000 and Garrett Lott, as Treasurer

SUPPLEMENTAL REPLY BRIEF OF RESPONDENTS SPIRIT OF AMERICA, ASHCROFT 2000 AND GARRETT M. LOTT, AS TREASURER, IN RESPONSE TO THE GENERAL COUNSEL'S SUPPLEMENTAL BRIEF

Respondents Spirit of America PAC ("SOA"), Ashcroft 2000 and Garrett M. Lott, their Treasurer, (collectively, "Respondents") hereby submit the following Supplemental Brief in Response to the General Counsel's Supplemental Brief dated August 25, 2003 ("GC's Supplemental Brief"). The undersigned counsel hereby submit this joint Brief on behalf of each of SOA, Ashcroft 2000 and Garrett M. Lott for reasons of judicial efficiency; however, each of SOA, Ashcroft 2000 and/or Garrett M. Lott retain the right to further proceed in this matter independently and with separate counsel (or on their own behalf) if any such Respondent deems such action necessary or proper, in each such Respondent's sole and absolute discretion.

I. OVERVIEW

The Supplemental Brief was submitted by the Office of General Counsel regarding the alleged "redirection" of list rental income ("LRI") from SOA to Ashcroft 2000. While the Supplemental Brief states that it does not alter the legal theories set forth in the General Counsel's Brief or the General Counsel's recommendations therein, in fact, the new discovery submitted by the General Counsel actually provides evidence which contravenes the General Counsel's recommendation that the Federal Election Commission ("FEC" or "Commission") find probable cause that Respondents violated the Federal Election Campaign Act ("FECA"). As stated below, the new discovery evidence actually bolsters Respondents' position in this matter that SOA and Ashcroft

2000 legally conducted the activities that are the subject of this MUR; therefore, no illegal in-kind contribution or other transfer was made by SOA to Ashcroft 2000[1].

As stated in Respondents' original joint Brief in Response to the General Counsel's Brief ("Respondents' First Brief"), the transactions under scrutiny by the FEC in this MUR and as referenced in the Complaint comprised nothing more than two commercially reasonable, arms-length transactions. In the first transaction, the Work Product Agreement dated July 17, 1998 (the "WPA") between John Ashcroft and SOA, John Ashcroft lent his name/likeness to fundraising efforts of SOA in exchange for ownership of the work product resulting from such efforts[2]. Through the WPA, John Ashcroft owned certain data, which ownership included the right to permit other entities (such as Ashcroft 2000) to use such data, including renting the data to third parties for income. SOA *a fortiori* owned the names of its own contributors. The WPA therefore provided John Ashcroft with an enhanced list in exchange for SOA's use of John Ashcroft's name and likeness that did not constitute an in-kind contribution from John Ashcroft to SOA, from SOA to Ashcroft 2000 or, as described below, from John Ashcroft to Ashcroft 2000.

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[1]As they have throughout this MUR, Respondents vigorously dispute that any violation of the FECA occurred. If the Supplemental Brief demonstrates anything, it shows the extent to which the General Counsel has overreached in its prosecution of this matter in pursuit of its theories. Even granting the legal theories advanced by the General Counsel in this matter (which Respondents vigorously deny in the strongest possible terms), the only sincere position that the General Counsel could now advance in light of the new discovery favorable to Respondents is that the amount of the violation that might have occurred is equal to the LRI checks "recut" by Eberle & Associates in December, 1999, not the cost of producing any mailing/contributor list *or* the market value of such lists. Again, Respondents dispute that any FECA violation occurred but raise this point to demonstrate the extent to which the General Counsel is overreaching in this matter.

[2]As the Warfield Affidavit and Griffiths Affidavit (defined and discussed below) have indicated, the transactions underlying the WPA and LLA were commercially reasonable, and the parties exchanged equivalent value thereby. Joyce Warfield and Bill Griffiths both represented by affidavit that the practice of lending one's name to an entity in exchange for the work product resulting from the use of such name in fundraising efforts was not unusual; as such, the WPA constituted a commercially reasonable transaction in which equivalent value was exchanged between John Ashcroft and SOA.

In the second transaction, the List License Agreement dated January 1, 1999 ("LLA") between John Ashcroft and Ashcroft 2000, John Ashcroft permitted Ashcroft 2000 to use certain data owned by John Ashcroft (including, but not limited to, work product derived from the WPA), including the right of Ashcroft 2000 to rent (*i.e.*, "sub-license") such data to third parties. In return, John Ashcroft received the right to any work product generated from the use of such data. The Deposition of Garrett Lott corroborated the overwhelming evidence in the record that WPA and LLA transactions constituted a commercially reasonable transaction in which equivalent consideration was exchanged[3]. The LLA was a standard list exchange agreement pursuant to which John Ashcroft permitted Ashcroft 2000 to use and rent (sub-license) certain data owned by John Ashcroft to third parties. The LLA provided John Ashcroft with an enhanced list in exchange for the use by Ashcroft 2000 of John Ashcroft's data, which did not constitute an in-kind contribution from either John Ashcroft *or* SOA to Ashcroft 2000.

Accordingly, probable cause does not exist that either SOA, Ashcroft 2000 or Garrett Lott as Treasurer of SOA or Ashcroft 2000 violated the FECA. As such, the FEC should take no further action regarding this MUR.

II. ADDITIONAL LIMITED DISCOVERY.

The FEC conducted additional "limited discovery" in this matter, including obtaining an Affidavit of William Griffiths and continuing the deposition of Garrett Lott (originally conducted February 28, 2003). Neither evidentiary submission provides any further basis upon which to determine that SOA, Ashcroft 2000 or Garrett Lott violated the FECA.

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[3] *See* August 4, 2003 Deposition of Garrett Lott at 54-57 (discussing entities for whom John Ashcroft lent his name/likeness in exchange for work product resulting therefrom); *see also* February 25, 2003 Deposition of Garrett Lott at 100-101; Affidavit of Joyce Warfield at ¶ 5; Deposition of Jack Oliver at 26; March 25, 2003 Deposition of Bruce Eberle at 43-45; and March 28, 2003 Deposition of Bruce Eberle at 10-11.

A. Affidavit of William Griffiths.

The Affidavit of William Griffiths ("Griffiths Affidavit")[4] is in large part irrelevant and does not contain any additional probative evidence that probable cause of an FECA violation exists. The Griffiths Affidavit is incomplete and as such serves as evidence of little more than William Griffith's own opinion and recollections (or lack thereof), not expert testimony or other credible evidence in support of the General Counsel's theory of this case.

Respondents do note, however, that at least one portion of the Griffiths Affidavit actually bolsters Respondents' defense in this matter. The first paragraph of the Griffiths Affidavit supports Respondents' contention that the lending by a well-known person of his/her name and likeness to an entity in exchange for the work product received from the use thereof (which occurred pursuant to the WPA) is a commercially reasonable occurrence:

> Solicitations mailed out often consist of letters signed by recognizable personalities. The individuals signing these letters *sometimes get something in exchange for their signature*, but usually they do not receive anything. However, when they do receive something it could be cash; *sometimes it is the use of the names* [emphasis added].

This excerpt clearly indicates that, although "recognizable personalities" do not always receive compensation in exchange for the use of their name/likeness, when they do receive compensation, it "sometimes" takes the form of the use of work product resulting from use of such person's name/likeness. The Griffiths Affidavit therefore corroborates the Affidavit of Joanna Boyce Warfield ("Warfield Affidavit") submitted by Respondents in support of Respondents' First Brief; the consideration received by John Ashcroft in exchange for the use of his name/likeness by SOA in

[4] As set forth in Respondents' initial Reply Brief, the testimony of persons associated with Eberle & Associates should be taken with a grain of salt; Eberle & Associates was terminated by SOA and Ashcroft 2000 and, as a disgruntled former vendor, the relationship between Eberle & Associates and SOA was strained at best.

its fundraising efforts, namely, the work product resulting from such efforts, was commercially reasonable.

As noted in Respondents' First Brief, the Warfield Affidavit provides independent evidence that the transactions underlying the WPA and the LLA were commercially reasonable. Respondents further note that the Warfield Affidavit is the only independent evidence in the record in this matter; testimony from Eberle & Associates' officers and representatives is biased against Respondents due to the tense relationship between these parties resulting from the termination of Eberle & Associates' Direct Mail Fundraising Agreement. The only disinterested evidence with respect to commercial reasonableness presented by either side, therefore, is the Warfield Affidavit and, as such, the Warfield Affidavit should be given significant weight in the Commission's consideration of this matter.

The remainder of the Griffiths Affidavit does not aid the General Counsel's case one bit. Although the Griffiths Affidavit at ¶ 5 indicates that Mr. Griffiths did not "personally recall ever seeing" a transaction exactly similar to the WPA and/or the LLA at issue in this MUR, such admission only constitutes evidence that Mr. Griffiths never experienced or witnessed such a transaction, *not* that such a transaction did not happen, could not happen or is not commercially reasonable. Similarly, the assertions at ¶¶ 6 and 7 with respect to LRI prove little except that Eberle & Associates required changes in the vendor-vendee relationship between it and its clients to be in writing.

However, the Griffiths Affidavit at ¶ 6 is incorrect in asserting that the Direct Mail Fundraising Agreement between Eberle & Associates and SOA represented that SOA "owns the list"; rather, this agreement (at Section 8(c)) merely provides that, *vis a vis* Eberle & Associates and SOA, SOA owns the work product "resulting from" direct mail fundraising conducted by Eberle &

Associates. The Direct Mail Fundraising Agreement is otherwise silent as to ownership of any data used by SOA/Eberle & Associates in direct mail fundraising efforts. As Respondents have consistently argued throughout this MUR, certain data was owned by John Ashcroft; to the extent SOA used such data, such use was at the permission of John Ashcroft (although SOA, of course, owned the names/addresses of its contributors, including the right to rent such names/addresses to third parties).

Like the Deposition of Bruce W. Eberle in the General Counsel's initial Brief, the Griffiths Affidavit does not and cannot serve as evidence of a sweeping and authoritative survey of the direct mail business, and an incomplete affidavit such as this is therefore of little weight as to: (i) whether equivalent consideration was exchanged between SOA and Senator Ashcroft; (ii) whether equivalent consideration was exchanged between Senator Ashcroft and Ashcroft 2000; or (iii) whether SOA, Ashcroft 2000 or Garrett Lott violated the FECA. To the extent the Griffiths Affidavit is deemed to be probative, it actually bolsters Respondents' defense in this matter.

B. Deposition of Garrett M. Lott dated August 7, 2003.

Similarly, the Deposition of Garrett M. Lott taken August 7, 2003 (a continuation of the prior deposition taken February 28, 2003) produced no new evidence in support of the FEC's claims that SOA made an excessive in-kind contribution to Ashcroft 2000. The GC's Supplemental Brief focuses primarily on the argument that the alleged "redirection" of LRI, from SOA to Ashcroft 2000, upon the direction of Garrett Lott, somehow constituted an impermissible in-kind contribution from SOA to Ashcroft 2000 (in keeping with the second alternative theory of FECA violations set forth in the General Counsel's Brief and the GC's Supplemental Brief)[5].

[5]Again, as noted at footnote 1, *supra*, the focus by the General Counsel in Garrett Lott's deposition on the LRI checks that were recut from SOA to Ashcroft 2000 indicates the extent to which the General Counsel is overreaching in this MUR. As stated above, although Respondents

This theory is advanced in the GC's Supplemental Brief on the grounds that this redirection was not "commercially reasonable". Respondents vigorously disagree that the LRI confusion that occurred in December, 1999 constituted an in-kind contribution from SOA to Ashcroft 2000. Respondents have established above and in Respondents' First Brief that the WPA and LLA were commercially reasonable[6] and that no illegal in-kind contribution resulted therefrom. If no in-kind contribution resulted from SOA to Ashcroft 2000 pursuant to the WPA/LLA, then it logically follows that the LRI confusion in December 1999 did not result in an in-kind contribution from SOA to Ashcroft 2000.

Garrett Lott's informing Respondents in late 1999 that LRI checks had been mistakenly issued to the wrong entity (SOA) was merely Garrett Lott's clarification of his previously unarticulated understanding, *not* an illegal in-kind contribution. Respondents have established throughout this matter that John Ashcroft (personally) was an owner (or co-owner with other entities) of certain work product/data resulting from the granting by John Ashcroft of permission to use his name/likeness to several entities engaged in fundraising efforts. Included in the ownership rights of John Ashcroft relating to this work product/data was the ability of John Ashcroft (at his sole and absolute discretion) to permit other parties to use such work product/data, including renting (sub-licensing) such work product/data to third parties for a fee.

John Ashcroft granted this sub-license right to Ashcroft 2000 on January 1, 1999 through the LLA. Once SOA's debts were paid off, SOA no longer desired to exercise its right to sublicense its

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deny that any FECA violation occurred, the only sincere position the General Counsel is left with is that the FECA violation equals the amount of these recut checks. However, the General Counsel fails to even make this allegation, and Respondents again deny that these recut checks constituted an FECA violation.

[6]*See* Affidavit of Joyce Warfield; Eberle Deposition testimony relating to Conservative Hotline; Griffiths Affidavit ¶ 1; and the deposition testimony of Jack Oliver and Garrett Lott.

contributor names to third parties; at the same time, Ashcroft 2000 (with John Ashcroft's authority pursuant to the LLA) exercised its right to sublicense John Ashcroft's data (which included, but was not limited to, the SOA contributor names). Garrett Lott, acting under color of authority of John Ashcroft, and in Garrett Lott's capacity as treasurer of each of SOA and Ashcroft 2000, informed Eberle & Associates that SOA was no longer licensing its contributor names to third parties, and Garrett Lott simultaneously informed Eberle & Associates that Ashcroft 2000 *was* the entity then entitled to license John Ashcroft's data to third parties for a fee (this notification took the form of a written letter at the request of Eberle & Associates in keeping with Eberle & Associates' internal policy related to vendor-vendee relationships)[7].

Because Ashcroft 2000 (with John Ashcroft's authority pursuant to the LLA) chose to begin to exercise its right to sub-license John Ashcroft's data to third parties at the time SOA's debt was retired, the LRI resulting from such sub-licenses by Eberle & Associates was owed to Ashcroft 2000, *not* SOA. Therefore, checks initially issued by Eberle & Associates to SOA were erroneous, because they should have been issued to Ashcroft 2000[8]. Upon Garrett Lott's notification to Eberle &

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[7]During this entire time period, contrary to the mistaken deposition testimony of Bruce Eberle (and Arthur Speck and Roseann Garber), at no time did the actual *ownership* of the data change: the data was *always* owned by John Ashcroft (and portions of that data were also owned by SOA and Ashcroft 2000, respectively). John Ashcroft's ownership of this data was not dependent on any internal titling of this list by Omega List Company (or Precision List), any marketing of the list by Omega List (or Precision List) or any other understanding or misunderstanding of Eberle & Associates, Omega List, Precision Marketing or Precision List. What changed in December 1999 was that SOA no longer licensed John Ashcroft's data to third parties (because its debts were paid off), and Ashcroft 2000 exercised its right under the LLA to license John Ashcroft's data to third parties.

[8]As such, the references in the GC's Supplemental Brief (or correspondence between Garrett Lott and Eberle & Associates representatives) to "shifting LRI proceeds" is of no legal significance and is, in fact, incorrect (of course, Garrett Lott and Eberle & Associates representatives are lay persons and, as such, no legal significance attaches to any legal terms of art they may happen to use). At no time did John Ashcroft or Garrett Lott "shift" any actual income earned (in fact, no income was ever due or owing to John Ashcroft). Rather, SOA (through Garrett Lott, its treasurer) ceased licensing John Ashcroft's data to third parties once its debts were paid off, and

Associates of this fact in late 1999, the erroneous checks were returned, and new checks were issued and subsequently deposited by Garrett Lott.

Because the WPA and LLA were commercially reasonable (a fact which neither the General Counsel's initial brief or the GC's Supplemental Brief effectively or persuasively disputes), and because Ashcroft 2000 had the right to sub-license John Ashcroft's data to third parties in 1999, Garrett Lott's actions in correcting the LRI misunderstanding in late 1999 resulted in no in-kind contribution from SOA to Ashcroft 2000. As such, the GC's Supplemental Brief and additional discovery submitted therewith provides no evidence of probable cause that an FECA violation occurred, and in fact provides further evidence that Respondents fully complied with the FECA in a series of commercially reasonable transactions. No further action should be taken by the FEC with respect to this MUR.

III. CONCLUSION

In short, the GC's Supplemental Brief demonstrates that the General Counsel has overreached in its legal theories throughout this MUR, and the additional evidentiary submissions cut against the General Counsel's claim that commercially reasonable transactions did not occur. The General Counsel has attempted to confuse and obfuscate the issues at hand through the use of excerpted testimony and self-serving affidavits that provide little to no evidence in support of the General Counsel's allegations. The key facts underlying this entire investigation remain unchallenged: Senator Ashcroft, SOA and Ashcroft 2000 engaged in commercially reasonable

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Ashcroft 2000 began licensing John Ashcroft's data at that time, as it was permitted to do under the LLA. In this manner, SOA and Ashcroft 2000 were no different than two persons taking turns driving a vehicle; once the first person stops driving, the second driver takes his/her turn. Significantly, neither the WPA nor the LLA reference, contemplate or permit a "shifting" of income incurred by the party entitled to use the data; rather, the agreements reflect the fact that each party had similar (yet distinct) use rights in the data. At no time did any party other than the party entitled to rent the data to third parties receive any income from the rental of the data; as

transactions in which equivalent consideration was exchanged, and, as such, no in-kind contribution was made by SOA to Ashcroft 2000. Accordingly, probable cause does not exist for the FEC to take any further action relative to this MUR.

Dated: September 16, 2003

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such, no illegal in-kind contribution occurred.